ERIE RAILROAD CO. v. TOMPKINS
304 U.S. 64 (1938)

The question for decision is whether the oft-challenged doctrine of Swift v. Tyson, 41 U.S. 1 (1842), shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for Southern New York, which had jurisdiction because the company is a corporation of that state. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way – that is, a longitudinal pathway as distinguished from a crossing – are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the state on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law, and that

> upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train.

The Erie had contended that application of the Pennsylvania rule was required,

among other things, by section 34 of the Federal Judiciary Act of September 24, 1789 [now 28 U.S.C. § 1652], which provides:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.

First. *Swift v. Tyson* held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is – or should be; and that, as there stated by Mr. Justice Story,

> the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

The Court in applying the rule of section 34 to equity cases, in Mason v. United States, 260 U.S. 545 (1922), said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute." The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34, and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written. [FN5]

FN5 Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923).

Second. Experience in applying the doctrine of *Swift v. Tyson* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state. . . .

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the [*Black & White*] *Taxicab* Case. [276 U.S. 518 (1928)]

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368 (1893), against ignoring the Ohio common law of fellow-servant liability:

> I am aware that what has been termed the general law of the country – which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject – has been often advanced in judicial opinions of this court to control a conflicting law of a state. . . . But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states, – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.

The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law":

> But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
> The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania. In support of their respective contentions the parties discussed and cited many decisions of the

Supreme Court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

[Concurring opinions omitted.]

KLAXON CO. v. STENTOR MANUFACTURING CO.
313 U.S. 487 (1941)

Mr. Justice REED delivered the opinion of the Court.

The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. . . .

In 1918 respondent, a New York corporation, transferred its entire business to petitioner, a Delaware corporation. Petitioner contracted to use its best efforts to further the manufacture and sale of certain patented devices covered by the agreement, and respondent was to have a share of petitioner's profits. The agreement was executed in New York, the assets were transferred there, and petitioner began performance there although later it moved its operations to other states. Respondent was voluntarily dissolved under New York law in 1919. Ten years later it instituted this action in the United States District Court for the District of Delaware, alleging that petitioner had failed to perform its agreement to use its best efforts. Jurisdiction rested on diversity of citizenship. In 1939 respondent recovered a jury verdict of $100,000, upon which judgment was entered. Respondent then moved to correct the judgment by adding interest at the rate of six percent from June 1, 1929, the date the action had been brought. The basis of the motion was the provision in section 480 of the New York Civil Practice Act directing that in contract actions interest be added to the principal sum "whether theretofore liquidated or unliquidated." The District Court granted the motion, taking the view that the rights of the parties were governed by New York law and that under New York law the addition of such interest was mandatory. The Circuit Court of Appeals affirmed, and we granted certiorari, limited to the question whether section 480 of the New York Civil Practice Act is applicable to an action in the federal court in Delaware.

The Circuit Court of Appeals was of the view that under New York law the right to interest before verdict under section 480 went to the substance of the obligation, and that proper construction of the contract in suit fixed New York as the place of performance. It then concluded that section 480 was applicable to the case because

> it is clear by what we think is undoubtedly the better view of the law that the rules for ascertaining the measure of damages are not a matter of procedure at all, but are matters of substance which should be settled by reference to the law of the appropriate state according to the type of case being tried in the forum. The measure of damages for breach of a contract is determined by the law of the place of performance.

. . . Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed.

We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins* against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie*. Any other ruling would do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. This Court's views are not the decisive factor in determining the applicable conflicts rule. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be. . . .

Accordingly, the judgment is reversed and the case remanded to the Circuit Court of Appeals for decision in conformity with the law of Delaware.

HANNA v. PLUMER
380 U.S. 460 (1965)

Mr. Chief Justice WARREN delivered the opinion of the Court.

The question to be decided is whether, in a civil action where the jurisdiction of the United States district court is based upon diversity of citizenship between the parties,

service of process shall be made in the manner prescribed by state law or that set forth in Federal Rule of Civil Procedure 4(d)(1).

[The plaintiff brought suit in federal court for injuries suffered in an auto accident, naming as defendant the executor of the estate of the other driver (who was herself was deceased). S]ervice [of the complaint] was made by leaving copies of the summons and the complaint with [defendant's] wife at his residence, concededly in compliance with Rule 4(d)(1), which provides [that service may be made]

> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

[The district court granted summary judgment for the defendant on the ground that the service of the complaint had failed to comply with a Massachusetts statute requiring that:]

> Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate.

The Court of Appeals for the First Circuit [found that the state law reflected] "a clear legislative purpose to require personal notification within the year," [and] concluded that the conflict of state and federal rules was over "a substantive rather than a procedural matter" [under the *Erie* doctrine, meaning that the state law must control.]

We conclude that the adoption of Rule 4(d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service. Accordingly, we reverse the decision of the Court of Appeals.

[The Court first held that Rule 4(d)(1) feel within the] Rules Enabling Act, 28 U.S.C. § 2072. [which] provides, in pertinent part:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury. . . .

Under the cases construing the scope of the Enabling Act, Rule 4(d)(1) clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the "practice and procedure of the district courts."

> The test must be whether a rule really regulates procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

[The Court then turned to the *Erie* question. In holding that the state rule must govern, the lower courts had relied on *Guaranty Trust v. York*, 326 U.S. 99 (1945), which held that state statutes of limitations must govern in diversity actions; and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), which held that the timeliness of a lawsuit had to be judged as of time of service of the complaint under a Kansas state law, rather than by the time of filing as Federal Rule of Civil Procedure 4 seemed to suggest. Both decisions had reasoned that a matter was "substantive," and therefore governed by state law under *Erie*, if the matter would determine the outcome of the case.]

[Defendant argues that:] (1) *Erie*, as refined in *York*, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. "Outcome-determination" analysis was never intended to serve as a talisman. . . .

Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law.

The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of *Swift v. Tyson*. . . . The "outcome-determination" test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is "outcome-determinative." For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a market effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of in-hand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the Erie opinion alluded.

There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie Railroad* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule. . . .

[I]n cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie*, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth [above, i.e. whether the Rule regulates "process" rather than "substantive rights and duties."]

[The Court then explained why it gives more deference to a Federal Rule.] The line between "substance" and "procedure" shifts as the legal context changes. It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law. But the opinion in *Erie*, which involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee), surely neither said nor implied that measures like Rule 4(d)(1) are unconstitutional. For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. M'Culloch v. State of Maryland, 17 U.S. 316 (1819).

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. [I]t cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid and controls the instant case.

GASPERINI v. CENTER FOR HUMANITIES, 518 U.S. 415 (1996): As part of a tort reform package, New York state passed a law empowering appellate courts to review the size of jury verdicts and order new trials when the jury's award "deviates materially from what would be reasonable compensation." (Before that, the governing standard for appellate review had been whether the size of the verdict "shock[ed] the conscience.") In a diversity action where Gasperini, a professional photographer, sued the Center for losing 300 photograph slides that he had entrusted to it, the jury awarded Gasperini $450,000. The district court upheld the verdict; but the court of appeals, holding that the district court had failed to apply the New York verdict-review properly, vacated the award and ordered a new trial unless the plaintiff accepted $100,000.

The Supreme Court agreed with the court of appeals that the state law was "substantive" and therefore, for *Erie* purposes, had to govern in federal court. "Gasperini acknowledges that a statutory cap on damages would supply substantive law for *Erie* purposes. [He concedes that] '[t]he state as a matter of its substantive law may, among other things, eliminate the availability of damages for a particular claim entirely, limit the factors a jury may consider in determining damages, or place an absolute cap on the

amount of damages available, and such substantive law would be applicable in a federal court sitting in diversity.' Although CPLR § 5501(c) is less readily classified, it was designed to provide an analogous control.

"New York's Legislature codified in § 5501(c) a new standard, one that requires closer court review than the common-law 'shock the conscience' test. More rigorous comparative evaluations attend application of § 5501(c)'s 'deviates materially' standard. . . . We think it a fair conclusion that CPLR § 5501(c) differs from a statutory cap principally 'in that the maximum amount recoverable is not set forth by statute, but rather is determined by case law.' In sum, § 5501(c) contains a procedural instruction [to appellate courts], but the State's objective is manifestly substantive.

It thus appears that if federal courts ignore the change in the New York standard and persist in applying the 'shock the conscience' test to damage awards on claims governed by New York law, 'substantial variations between state and federal [money judgments]' may be expected. See *Hanna v. Plumer*. We therefore agree with the Second Circuit that New York's check on excessive damages implicates what we have called *Erie* 's 'twin aims.' Just as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."

The Court also held that the state rule could be applied consistently with the Seventh Amendment's requirement that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." But it found that the court of appeals had not complied with the Reexamination Clause in that case. The Court first noted that the Reexamination Clause permitted trial judges to exercise the kind of review of jury verdicts that they historically had done, "includ[ing] overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction." Although "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development," the Court still found such review consistent with the Reexamination Clause if it was done under a deferential standard: "[A]ppellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice."

Citing *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525 (1958), the Court found that the proper allocation of functions between federal trial and appellate courts is an "essential characteristic of the federal system" and therefore the allocation in a particular case had to satisfy federal standards. But the opinion continued: "[In *Byrd*] the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice. In the case before us, [by contrast,] the principal state and federal interests can be accommodated. [N]ew York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i.e.,* that court can apply the

State's 'deviates materially' standard in line with New York case law evolving under CPLR § 5501(c).

"District court applications of the "deviates materially" standard would be subject to appellate review under the standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion. In light of *Erie*' s doctrine, the federal appeals court must be guided by the damage- control standard state law supplies, as the Second Circuit itself has said: 'If we reverse, it must be because of an abuse of discretion. . . . We must give the benefit of every doubt to the judgment of the trial judge.' . . .

"Accordingly, we vacate the judgment of the Court of Appeals and instruct that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against CPLR § 5501(c)'s 'deviates materially' standard," with the appellate court then reviewing that determination under an abuse-of-discretion standard..

FERENS v. JOHN DEERE CO., 494 U.S. 516 (1990): Under 28 U.S.C. § 1404(a), a district court may, "for the convenience of the parties and witnesses, in the interests of justice," "transfer any civil action to any other district or division where it might have been brought." In *Van Dusen v. Barrack,* 376 U.S. 612 (1964), the Court held that, following a transfer under § 1404(a) initiated by a defendant, the transferee court must follow the choice-of-law rules that prevailed in the transferor court. *Ferens* posed the question whether the same rule should apply when the plaintiff moved for the transfer.

While working on his farm in Pennsylvania, Albert Ferens lost a hand when it became caught in his combine harvester, manufactured by Deere. He did not file suit in Pennsylvania until after the 2-year Pennsylvania tort statute of limitations had expired (his suit there included only contract and warranty claims). But Ferens filed a second diversity suit in federal court in Mississippi, and the federal court there, following Mississippi's choice of law rules because of *Klaxon*, held that Mississippi's 6-year statute of limitations should govern, even though the remainder of the case would be governed by Pennsylvania law. Then the Ferenses "took their forum shopping a step further," in the Court's words, by moving to transfer the case to Pennsylvania federal court under § 1404(a) on the ground that Pennsylvania was a more convenient forum. However, after transfer the district court in Pennsylvania refused to apply the 6-year Mississippi limitations period and held the action time-barred; it distinguished *Van Dusen* on the ground that here the plaintiff had requested the transfer. The court of appeals ultimately affirmed the dismissal on this ground.

Although the Supreme Court expressed skepticism about Ferens' manipulation of forums, it nevertheless reversed and held that the law of the transferor court (Mississippi) should apply. It considered three factors from *Van Dusen*: "First, § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law."

With respect to the first factor, the Court said that applying the law of the transferee court "would undermine the *Erie* rule in a serious way. It would mean that initiating a transfer under § 1404(a) changes the state law applicable to a diversity case." With respect to the second factor, the Court said that applying the transferor court's law would not increase opportunities for forum shopping, because such an opportunity "exists whenever a party has a choice of forums that will apply different laws. . . . [E]ven without § 1404(a), a plaintiff already has the option of shopping for a forum with the most favorable law. The Ferenses, for example, had an opportunity for forum shopping in the state courts because both the Mississippi and Pennsylvania courts had jurisdiction and because they each would have applied a different statute of limitations. Diversity jurisdiction did not eliminate these forum shopping opportunities; instead, under *Erie,* the federal courts had to replicate them. See *Klaxon* ('Whatever lack of uniformity [*Erie*] may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors'). Applying the transferor law would not give a plaintiff an opportunity to use a transfer to obtain a law that he could not obtain through his initial forum selection. If it does make selection of the most favorable law more convenient, it does no more than recognize a forum shopping choice that already exists. . . . Applying the transferee law, by contrast, might create opportunities for forum shopping in an indirect way. [T]o the extent that it discourages plaintiff-initiated transfers, [it] might give States incentives to enact similar [lengthy statutes of limitations] to bring in out-of-state business that would not be moved at the instance of the plaintiff."

With respect to the third factor, the Court reasoned that applying the transferee court's law might discourage and complicate otherwise-convenient transfers: "If the law were to change following a transfer initiated by a plaintiff, a district court . . . would be at least reluctant to grant a transfer that would prejudice the defendant. Hardship might occur because plaintiffs may find as many opportunities to exploit application of the transferee law as they would find opportunities for exploiting application of the transferor law. If the transferee law were to apply, moreover, the plaintiff simply would not move to transfer unless the benefits of convenience outweighed the loss of favorable law.

"Some might think that a plaintiff should pay the price for choosing an inconvenient forum by being put to a choice of law versus forum. But this assumes that § 1404(a) is for the benefit only of the moving party. By the statute's own terms, it is not.

Section 1404(a) also exists for the benefit of the witnesses and the interest of justice, which must include the convenience of the court. . . . The desire to take a punitive view of the plaintiff's actions should not obscure the systemic costs of litigating in an inconvenient place." The Court also found that "[f]oresight and judicial economy . . . favor the simple rule that the law does not change following a transfer of venue under § 1404(a)."

Justice Scalia, joined by three other justices, dissented: "In my view, neither of [the rationales underlinyg *Van Dusen*] is served – and indeed both are positively defeated – by [applying the law of the transferor court when a plaintiff seeks transfer]. First, just as it is unlikely that Congress, in enacting § 1404(a), meant to provide the defendant with a vehicle [i.e., transfer] by which to manipulate in his favor the substantive law to be applied in a diversity case, so too is it unlikely that Congress meant to provide the *plaintiff* with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case. Second, application of the transferor court's law in this context would encourage forum shopping between federal and state courts in the same jurisdiction on the basis of differential substantive law. It is true, of course, that the plaintiffs here did not select the *Mississippi* federal court in preference to the Mississippi state courts because of any differential substantive law; the former, like the latter, would have applied Mississippi choice-of-law rules and thus the Mississippi statute of limitations. But one must be blind to reality to say that it is the *Mississippi* federal court in which these plaintiffs have chosen to sue. That was merely a way station en route to suit in the *Pennsylvania* federal court. The plaintiffs were seeking to achieve exactly what *Klaxon* was designed to prevent: the use of a Pennsylvania federal court instead of a Pennsylvania state court in order to obtain application of a different substantive law. . . . The significant federal judicial policy expressed in *Erie* and *Klaxon* is reduced to a laughingstock if it can so readily be evaded through filing-and-transfer.

"The Court suggests that applying the choice-of-law rules of the forum court to a transferred case ignores the interest of the federal courts themselves in avoiding the 'systemic costs of litigating in an inconvenient place.' The point, apparently, is that these systemic costs will increase because the change in law attendant to transfer will not only deter the plaintiff from moving to transfer but will also deter the court from ordering *sua sponte* a transfer that will harm the plaintiff's case. [But] where the systemic costs are that severe, transfer ordinarily will occur whether the plaintiff moves for it or not; the district judge can be expected to order it *sua sponte.* I do not think that the prospect of depriving the plaintiff of favorable law will any more deter a district judge from transferring than it would have deterred a district judge, under the prior regime, from ordering a dismissal *sua sponte* pursuant to the doctrine of *forum non conveniens.* In fact the deterrence to *sua sponte* transfer will be considerably less, since transfer involves no risk of statute-of-limitations bars to refiling.

"Thus, it seems to me that a proper calculation of systemic costs would go as follows: Saved by the Court's rule will be the incremental cost of trying in forums that are inconvenient (but not so inconvenient as to prompt the court's *sua sponte* transfer) those

suits that are now filed in such forums for choice-of-law purposes. But incurred by the Court's rule will be the costs of considering and effecting transfer, not only in those suits but in the indeterminate number of additional suits that will be filed in inconvenient forums now that filing-and-transfer is an approved form of shopping for law; plus the costs attending the necessity for transferee courts to figure out the choice-of-law rules (and probably the substantive law) of distant States much more often than our *Van Dusen* decision would require. It should be noted that the file-and-transfer ploy sanctioned by the Court today will be available not merely to achieve the relatively rare (and generally unneeded) benefit of a longer statute of limitations, but also to bring home to the desired state of litigation all sorts of favorable choice-of-law rules regarding substantive liability – in an era when the diversity among the States in choice-of-law principles has become kaleidoscopic. . . . In sum, it seems to me quite likely that today's decision will cost the federal courts more time than it will save them."

SWOPE v. SIEGEL-ROBERT, INC.
243 F.3d 486 (8th Cir. 2001)

[Siegel-Robert, a Missouri closely-held corporation, undertook a merger for tax purposes. A minority group of 15 shareholders voted against the merger, and when the merger went through, four of them objected to the $20 price that the company offered for their shares. They brought a diversity action in federal district court for an appraisal of the fair value of the shares. The various possible methods for valuing the stock produced results from $98 to $30 a share. The district court set the value at $63, discounting it based on the fact that the shares, though marketable, would give holders only a minority of shares in the company. Both sides appealed on various grounds.]

McMILLIAN, Circuit Judge.

[The plaintiffs, in their cross-appeal,] argue that the district court erred by discounting the value of the Company's stock to account for its minority status. We agree.

The purpose of a minority discount is to "adjust for lack of control over the business entity on the theory that non-controlling shares of stock are not worth their proportionate share of the firm's value because they lack voting power to control corporate actions." [However,] the application of a minority discount is not appropriate in an appraisal action, where the minority sellers are unwilling to dispose of their stock. [Citing cases from other jurisdictions.] Rather, minority shareholders are entitled to receive the full value of their shares as if they were able to retain the stock.

The application of a minority discount undermines the purpose of a fair value appraisal statute by penalizing minority shareholders for their lack of control and encouraging majority shareholders to take advantage of their power. The overriding principle holds that "to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process." Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989). . . . Most courts addressing the issue have refused to apply minority discounts, reasoning that "using discounts injects speculation into the appraisal process, fails to give minority shareholders the full proportionate value of their stock, encourages corporations to squeeze out minority shareholders, and penalizes the minority for taking advantage of the protection afforded by dissenters' rights statutes." [Citing *Cavalier Oil* and other cases.] We agree with the reasoning of these courts and likewise hold that minority status of the stock is not a relevant fact or circumstance to be considered in a dissenting shareholders' appraisal proceeding. . . .

The Company asserts that this court does not have the authority to disallow minority or marketability discounts because only the Missouri state courts are capable of rendering such interpretations of Missouri statutes under the *Erie* doctrine. While it is true that Missouri's state court precedents have permitted minority and marketability discounts at the discretion of the trial court, the Missouri Supreme Court has not

considered the issue. We agree with the general proposition that "a federal court with diversity jurisdiction is bound only by state law as determined by the highest state court." However, where the state's highest court has not ruled, we must follow the decisions of the state's intermediate courts when they are the best evidence of what the state's law is.

In the present case, we are not bound by Missouri's intermediate appellate court decisions because we are "convinced by other persuasive data that the highest court of the state would decide otherwise." Specifically, we find Delaware's decisions on this matter persuasive, not only because of Delaware's expertise in analyzing issues of corporate law, but also for its reasoning in the seminal case of *Cavalier Oil,* in which the Delaware Supreme Court convincingly justified the rejection of minority and lack of marketability discounts. We are also influenced by the logic of other state courts who have interpreted their similarly-worded appraisal statutes to disallow minority and lack of marketability discounts. While the district court correctly observed that many states have held that the application of discounts is discretionary, only one of those decisions was issued after the influential *Cavalier Oil* decision. As a result, we conclude that if deciding the issue today, the Missouri Supreme Court would follow the compelling logic of the current trend toward disallowing minority and marketability discounts in dissenting shareholders' fair value appraisal determinations.

Because the district court's final determination of the minority shareholders' price-per-share presumably reflected a discount for minority status based on an erroneous assumption of law, we remand to the district court for a re-evaluation of the fair value of the stock consistent with this opinion.

GUILLARD v. NIAGARA MACHINE AND TOOL WORKS
488 F.2d 20 (8th Cir. 1973)

ROSS, Circuit Judge.

[Gary Guillard, a press operator employed by Gage Tool Company, lost his left hand and part of his right on the job while operating a press manufactured by Niagara Machine and Tool. He received compensation and medical benefits under the Minnesota workers' compensation statute. He then brought a diversity action in federal court against Niagara, alleging design defects, failure to warn, negligence, and breach of implied warranty. Niagara impleaded Gage Tool, alleging that Gage had been negligent and reckless in installing and maintaining the press, and seeking indemnity or contribution according to the respective degrees of fault. The district court dismissed the third-party claim by Niagara on the ground that any tort liability of Gage was barred by

the workers' compensation statute and Guillard's receipt of benefits under it. Niagara appealed.

The court of appeals noted that a contribution right against Gage Tool depended on there being "common liability" between Niagara and Gage, and thus it was barred because Gage's liability had been extinguished by the payment of worker's compensation. With respect to indemnity, the court said:]

Indemnity is the remedy securing the right of a person to recover reimbursement from another for the discharge of a liability which, as between them, should have been discharged by the other. It is appropriate where one party has a primary or greater liability or duty which justly requires him to bear the whole of the burden as between the parties. Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 370 (1960). *Hendrickson* held that the Workmen's Compensation Act of Minnesota does not preclude the recovery of indemnity from an employer by a third party. However, the circumstances of the recovery of indemnity were limited to five situations [none applicable here].

In Haney v. International Harvester Co., 294 Minn. 375 (1972), a factual situation similar to the one which faces us now was before the Minnesota Supreme Court. The sole issue noted on appeal in that case was whether the third-party action against plaintiff's employer should have been dismissed where the plaintiff-employee, having received workmen's compensation benefits, sued the defendant for common law negligence and defendant brought the employer in as a third party for contribution or indemnity.

The Minnesota Court recognized that under the rationale of *Hendrickson,* neither contribution nor indemnity were applicable. Contribution would not apply because there was no common liability between the employer and the manufacturer, the employer's liability to the employee having been extinguished by payment of workmen's compensation. Indemnity would not apply because the defendant's situation did not fit any of the five situations specified in *Hendrickson.* The court then reasoned that an obvious injustice *may* be done to a third party tortfeasor in cases similar to the one which they were considering. The court concluded that since there may be a due process violation when a third-party tortfeasor's right to indemnity is extinguished by the workmen's compensation laws without providing him a reasonable substitute for his right, they should reconsider granting indemnification where there is a great disparity in the degree of fault of the parties. However, the court indicated a reluctance to decide the important issues presented by the case without a factual setting. Accordingly, the court held that, because of the question posed, they preferred to have a trial, which would include a determination of percentage of negligence as between the employee, the employer and the manufacturer. The trial court was directed to pass upon all issues raised in new trial including all the issues discussed in the opinion. The order of the district court dismissing the third-party action by the manufacturer against the employer was reversed but without prejudice to a renewal of a motion for a similar order after the trial and after a final determination of the Minnesota Supreme Court. Prior to retrial, however, the case was settled.

We believe that the Minnesota Supreme Court indicated in *Haney* that they intended to change the Minnesota rule that precluded indemnity from an employer who was a joint tortfeasor, but whose common liability was extinguished by the payment of workmen's compensation. However, while the Minnesota court may have signaled that a change in Minnesota law was imminent, nevertheless it did not indicate the substantive scope of that change. Thus, we are faced not with a question of unclear state law where there is ambivalent precedent in the state courts; rather, we are faced with a problem of nonformulated state law.

We realize that, in a diversity case, it is the duty of the federal courts, when faced with a legal question of state law, to ascertain and apply the law of the state, that is, to determine what the highest state court would declare state law to be if the case were before it. Difficulties of ascertaining what the state court may hereafter determine the state law to be, do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision. However, during the last session of the Minnesota state legislature [1973], a law was passed which may provide an appropriate vehicle to the resolution of the problem with which we are faced. That act was codified in Minn.Stat. §§ 480.061 [currently § 480.065] and provides:

> The [Minnesota] supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

[T]he certification procedure thereby authorized is similar to one that exists in Florida and which the [U.S.] Supreme Court has approved. This procedure has been repeatedly employed, not without some criticism, by the Fifth Circuit with respect to questions of Florida law. [Citations omitted.]

We recognize the dangers inherent in perfunctory reliance upon such a procedure to resolve difficult questions of state law. However, certification in this case does not present the same infirmities. *Haney* did not change the substantive law in Minnesota. It simply indicated a willingness to change that law. We are reluctant to define the perimeters of that change when the Minnesota court itself did not do so on an abbreviated record. Thus, we remand to the district court with directions to permit the third party claim. If a verdict for the plaintiff is found, the triers of fact shall also pass upon all questions relevant to the third party claim including a determination of percentage of negligence as between Guillard, Niagara and Gage. After such findings are made, but before entry of judgment, the district court is directed to certify the question of law to the Minnesota Supreme Court pursuant to Minn. Stat. §§ 480.061, unless those findings

include a determination that Gage was not negligent or that its negligence did not contribute to the accident.

Reversed and remanded for further proceedings consistent with the views expressed in this opinion.

MINNESOTA STATUTES § 480.065

Uniform Certification of Questions of Law

Subdivision 1. Definitions. In this section:

(1) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(2) "Tribe" means a tribe, band, or village of native Americans which is recognized by federal law or formally acknowledged by a state.

Subd. 2. Power to certify. The supreme court or the court of appeals of this state, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state if:

(1) the pending litigation involves a question to be decided under the law of the other jurisdiction;

(2) the answer to the question may be determinative of an issue in the pending litigation; and

(3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

Subd. 3. Power to answer. The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.

Subd. 4. Power to reformulate question. The supreme court of this state may reformulate a question of law certified to it.

Subd. 5. Certification order; record. The court certifying a question of law to the supreme court of this state shall issue a certification order and forward it to the supreme

court of this state. Before responding to a certified question, the supreme court of this state may require the certifying court to deliver all or part of its record to the supreme court of this state.

Subd. 6. Contents of certification order. (a) A certification order must contain:
(1) the question of law to be answered;
(2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;
(3) a statement acknowledging that the supreme court of this state, acting as the receiving court, may reformulate the question; and
(4) the names and addresses of counsel of record and parties appearing without counsel.
(b) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

Subd. 7. Notice; response. The supreme court of this state, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

Subd. 8. Procedures. After the supreme court of this state has accepted a certified question, proceedings are governed by the rules and statutes of this state. Procedures for certification from this state to a receiving court are those provided in the rules and statutes of the receiving forum.

Subd. 9. Opinion. The supreme court of this state shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.

Subd. 10. Cost of certification. Fees and costs are the same as in civil appeals docketed before the supreme court of this state and must be equally divided between the parties unless otherwise ordered by the certifying court.

Subd. 11. Short title. This section may be cited as the 'Uniform Certification of Questions of Law Act (1997)."

BOYLE v. UNITED TECHNOLOGIES CORP.
487 U.S. 500 (1988)

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect.

I

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when the CH-53D helicopter in which he was flying crashed off the coast of Virginia Beach, Virginia, during a training exercise. Although Boyle survived the impact of the crash, he was unable to escape from the helicopter and drowned. Boyle's father, petitioner here, brought this diversity action in Federal District Court against the Sikorsky Division of United Technologies Corporation (Sikorsky), which built the helicopter for the United States.

At trial, petitioner [alleged, among other things,] under Virginia tort law . . . that Sikorsky had defectively designed the copilot's emergency escape system: the escape hatch opened out instead of in (and was therefore ineffective in a submerged craft because of water pressure), and access to the escape hatch handle was obstructed by other equipment. The jury returned a general verdict in favor of petitioner and awarded him $725,000. The District Court denied Sikorsky's motion for judgment notwithstanding the verdict.

The Court of Appeals reversed [on the ground, among others,] that Sikorsky could not be held liable for the allegedly defective design of the escape hatch because, on the evidence presented, it satisfied the requirements of the "military contractor defense," which the court had recognized the same day in [another case].

Petitioner sought review here, challenging the Court of Appeals' decision on three levels: First, petitioner contends that there is no justification in federal law for shielding Government contractors from liability for design defects in military equipment. Second, he argues in the alternative that even if such a defense should exist, the Court of Appeals' formulation of the conditions for its application is inappropriate. Finally, petitioner contends that the Court of Appeals erred in not remanding for a jury determination of whether the elements of the defense were met in this case.

II

Petitioner's broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law. But we have held that a few areas, involving “uniquely federal interests,” are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called “federal common law.”

The dispute in the present case borders upon two areas that we have found to involve such "uniquely federal interests." We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). The present case does not involve an obligation to the United States under its contract, but rather liability to third persons. That liability may be styled one in tort, but it arises out of performance of the contract – and traditionally has been regarded as sufficiently related to the contract that until 1962 Virginia would generally allow design defect suits only by the purchaser and those in privity with the seller.

Another area that we have found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty. We have held in many contexts that the scope of that liability is controlled by federal law. See, e.g., Westfall v. Erwin, 484 U.S. 292 (1988). The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done.

We think the reasons for considering these closely related areas to be of "uniquely federal" interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts. [I]t is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one – even though the dispute is one between private parties. It is true that where "litigation is purely between private parties and does not touch the rights and duties of the United States," federal law does not govern. Thus, for example, in Miree v. DeKalb County, 433 U.S. 25 (1977), which involved the question whether certain private parties could sue as third-party beneficiaries to an agreement between a municipality and the Federal Aviation Administration, we found that state law was not displaced because "the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened" by allowing state law to determine whether third-party beneficiaries could sue, and because "any federal interest in the outcome of the [dispute] before us '[was] far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" But the same is not true here. The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law. Displacement will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," or the application of state law would "frustrate specific objectives" of federal legislation. The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption

when Congress legislates "in a field which the States have traditionally occupied." Or to put the point differently, the fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. See, *e.g., Clearfield Trust* (rights and obligations of United States with respect to commercial paper must be governed by uniform federal rule). In others, the conflict is more narrow, and only particular elements of state law are superseded. See, *e.g.,* Howard v. Lyons, 360 U.S. 597 (1960) (state defamation law generally applicable to federal official, but federal privilege governs for statements made in the course of federal official's duties).

In *Miree, supra,* the suit was not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract. Rather, it was the contractual duty *itself* that the private plaintiff (as third-party beneficiary) sought to enforce. Between *Miree* and the present case, it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed. If, for example, the United States contracts for the purchase and installation of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.
The present case, however, is at the opposite extreme from *Miree.* Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications). Even in this sort of situation, it would be unreasonable to say that there is always a "significant conflict" between the state law and a federal policy or interest. If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.

There is . . . a statutory provision that demonstrates the potential for, and suggests the outlines of, "significant conflict" between federal interests and state law in the context of Government procurement. In the Federal Tort Claims Act, Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred. 28 U.S.C. § 1346(b). It excepted from this consent to suit, however,

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.

We agree with the scope of displacement adopted by the Fourth Circuit here. . . . Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.,* they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.

We have considered the alternative formulation of the Government contractor defense, urged upon us by petitioner, which was adopted by the Eleventh Circuit. . . . That would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably

known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design. While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the "discretionary function" exemption. The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

III

[Although the Court accepted the Fourth Circuit's statement of the government contractor defense, it remanded for that court to clarify whether it had determined that the defense was valid as a matter of law in this case, or whether it had made a factual judgment that the defense was valid. (If it was the latter, the Court said, then the court had erred by making a factual determination, and the case should have been sent back for a new trial.]

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

Lieutenant David A. Boyle died when the CH-53D helicopter he was copiloting spun out of control and plunged into the ocean. We may assume, for purposes of this case, that Lt. Boyle was trapped under water and drowned because respondent United Technologies negligently designed the helicopter's escape hatch. We may further assume that any competent engineer would have discovered and cured the defects, but that they inexplicably escaped respondent's notice. Had respondent designed such a death trap for a commercial firm, Lt. Boyle's family could sue under Virginia tort law and be compensated for his tragic and unnecessary death. But respondent designed the helicopter for the Federal Government, and that, the Court tells us today, makes all the difference: Respondent is immune from liability so long as it obtained approval of "reasonably precise specifications" – perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them.

If respondent's immunity "bore the legitimacy of having been prescribed by the people's elected representatives," we would be duty bound to implement their will, whether or not we approved. United States v. Johnson, 481 U.S. 681 (1987) (dissenting opinion of SCALIA, J.). Congress, however, has remained silent – and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some defense. [Citing six failed bills from 1979 to 1987 that would have indemnified government contractors or limited their liability.] The Court – unelected and unaccountable to the people – has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle's family the compensation that state law assures them. This time the injustice is of this Court's own making.

Worse yet, the injustice will extend far beyond the facts of this case, for the Court's newly discovered Government contractor defense is breathtakingly sweeping. It applies not only to military equipment like the CH-53D helicopter, but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans – from NASA's Challenger space shuttle to the Postal Service's old mail cars. The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach. It applies even if the Government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a Government building can invoke the defense when the elevator cable snaps or the walls collapse. And the defense is invocable regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the Government, however unreasonably dangerous, were "reasonably precise."

In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States or the coffers of industry. Because I would leave that exercise of legislative power to Congress, where our Constitution places it, I would reverse the Court of Appeals and reinstate petitioner's jury award.

I

Before our decision in *Erie*, federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion rules of "general" federal common law. Erie renounced the prevailing scheme. . . . *Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law. [FN2]

> FN2. Not all exercises of our power to fashion federal common law displace state law in the same way. For example, our recognition of federal causes of action based upon either the Constitution, see, *e.g., Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), or a federal statute, see *Cort v. Ash,* 422 U.S. 66 (1975), supplements whatever rights state law might provide, and therefore does not implicate federalism concerns in the same way as does pre-emption of a state-law rule of decision or cause of action. Throughout this opinion I use the word "displace" in the latter sense.

In pronouncing that "[t]here is no federal general common law," *Erie* put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law. As the author of today's opinion for the Court pronounced for a unanimous Court just two months ago, "we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." Puerto Rico Dept. of Consumer Affairs v.

Isla Petroleum Corp., 485 U.S. 495, 500 (1988). Just as "[t]here is no federal pre-emption *in vacuo,* without a constitutional text or a federal statute to assert it," federal common law cannot supersede state law *in vacuo* out of no more than an idiosyncratic determination by five Justices that a particular area is "uniquely federal." . . .

Accordingly, we have emphasized that federal common law can displace state law in "few and restricted" instances. "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." . . .

II

Congress has not decided to supersede state law here (if anything, it has decided not to, see [the list of failed bills] *supra*) and the Court does not pretend that its newly manufactured "Government contractor defense" fits within any of the handful of "narrow areas," of "uniquely federal interests" in which we have heretofore done so. Rather, the Court creates a new category of "uniquely federal interests" out of a synthesis of two whose origins predate *Erie* itself: the interest in administering the "obligations to and rights of the United States under its contracts," and the interest in regulating the "civil liability of federal officials for actions taken in the course of their duty." This case is, however, simply a suit between two private parties. We have steadfastly declinedto impose federal contract law on relationships that are collateral to a federal contract, or to extend the federal employee's immunity beyond federal employees. And the Court's ability to list 2, or 10, inapplicable areas of "uniquely federal interest" does not support its conclusion that the liability of Government contractors is so "clear and substantial" an interest that this Court must step in lest state law does "major damage."

A

The proposition that federal common law continues to govern the "obligations to and rights of the United States under its contracts" is nearly as old as *Erie* itself. Federal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract. . . . But it is by now established that our power to create federal common law controlling the *Federal Government's* contractual rights and obligations does not translate into a power to prescribe rules that cover all transactions or contractual relationships collateral to Government contracts.

In *Miree v. DeKalb County, supra,* for example, the county was contractually obligated under a grant agreement with the Federal Aviation Administration (FAA) to " 'restrict the use of land adjacent to . . . the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.' " At issue was whether the county breached its contractual obligation by operating a garbage dump adjacent to the airport, which allegedly attracted the swarm of birds that caused a plane

crash. Federal common law would undoubtedly have controlled in any suit by the Federal Government to enforce the provision against the county or to collect damages for its violation. The diversity suit, however, was brought not by the Government, but by assorted private parties injured in some way by the accident. We observed that "the operations of the UnitedStates in connection with FAA grants such as these are undoubtedly of considerable magnitude," and that "the United States has a substantial interest in regulating aircraft travel and promoting air travel safety," Nevertheless, we held that state law should govern the claim because "only the rights of private litigants are at issue here," and the claim against the county "will have *no direct effect upon the United States or its Treasury*" (emphasis added). [Discussion of other cases omitted.]

Here, as in *Miree* [and other cases discussed,] a Government contract governed by federal common law looms in the background. But here, too, the United States is not a party to the suit and the suit neither "touch[es] the rights and duties of the United States," nor has a "direct effect upon the United States or its Treasury." The relationship at issue is at best collateral to the Government contract. . . .

That the Government might have to pay higher prices for what it orders if delivery in accordance with the contract exposes the seller to potential liability, does not distinguish this case. Each of the cases just discussed declined to extend the reach of federal common law despite the assertion of comparable interests that would have affected the terms of the Government contract -- whether its price or its substance – just as "directly" (or indirectly). Third-party beneficiaries can sue under a county's contract with the FAA, for example, even though – as [*Miree*'s] focus on the absence of "*direct* effect on the United States or its Treasury" suggests – counties will likely pass on the costs to the Government in future contract negotiations. . . .

B

Our "uniquely federal interest" in the tort liability of affiliates of the Federal Government is equally narrow. The immunity we have recognized has extended no further than a subset of "officials of the Federal Government" and has covered only "discretionary" functions within the scope of their legal authority. [Citations omitted.] Never before have we so much as intimated that the immunity (or the "uniquely federal interest" that justifies it) might extend beyond that narrow class to cover also nongovernment employees whose authority to act is independent of any source of federal law and that are as far removed from the "functioning of the Federal Government" as is a Government contractor.

The historical narrowness of the federal interest and the immunity is hardly accidental. A federal officer exercises statutory authority, which not only provides the necessary basis for the immunity in positive law, but also permits us confidently to presume that interference with the exercise of discretion undermines congressional will. In contrast, a Government contractor acts independently of any congressional enactment. Thus, immunity for a contractor lacks both the positive law basis and the presumption that it furthers congressional will.

Moreover, even within the category of congressionally authorized tasks, we have deliberately restricted the scope of immunity to circumstances in which "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens," because immunity "contravenes the basic tenet that individuals be held accountable for their wrongful conduct."

The extension of immunity to Government contractors skews the balance we have historically struck. On the one hand, whatever marginal effect contractor immunity might have on the "effective administration of policies of government," its "harm to individual citizens" is more severe than in the Government-employee context. Our observation that "there are . . . other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" *offers little deterrence to the Government contractor. On the other hand, a grant of immunity to Government contractors could not advance "the fearless, vigorous, and effective administration of policies of government" nearly as much as does the current immunity for Government employees. In the first place, the threat of a tort suit is less likely to influence the conduct of an industrial giant than that of a lone civil servant, particularly since the work of a civil servant is significantly less profitable, and significantly more likely to be the subject of a vindictive lawsuit. In fact, were we to take seriously the Court's assertion that contractors pass their costs -- including presumably litigation costs – through, "substantially if not totally, to the United States,"* the threat of a tort suit should have only marginal impact on the conduct of Government contractors. More importantly, inhibition of the Government official who actually sets Government policy presents a greater threat to the "administration of policies of government," than does inhibition of a private contractor, whose role is devoted largely to assessing the technological feasibility and cost of satisfying the Government's predetermined needs. Similarly, unlike tort suits against Government officials, tort suits against Government contractors would rarely "consume time and energies" that "would otherwise be devoted to governmental service."

In short, because the essential justifications for official immunity do not support an extension to the Government contractor, it is no surprise that we have never extended it that far. . . .

III

[T]he Court invokes the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a). The Court does not suggest that the exception has any direct bearing here, for petitioner has sued a private manufacturer (not the Federal Government) under Virginia law (not the FTCA). . . .

[The Court reasons] that federal common law must immunize Government contractors from state tort law to prevent erosion of the discretionary function exception's *policy* of foreclosing judicial " 'second-guessing' " of discretionary governmental decisions.. The erosion the Court fears apparently is rooted not in a concern that suits against Government contractors will prevent them from designing, or the Government

from commissioning the design of, precisely the product the Government wants, but in the concern that such suits might preclude the Government from purchasing the desired product at the price it wants: "The financial burden of judgments against the contractors," the Court fears, "would ultimately be passed through, substantially if not totally, to the United States itself." . . .

[But] the Government's immunity for discretionary functions is not even "a product of" the FTCA. Before Congress enacted the FTCA (when sovereign immunity barred any tort suit against the Federal Government) we perceived no need for a rule of federal common law to reinforce the Government's immunity by shielding also parties who might contractually pass costs on to it. Nor did we (or any other court of which I am aware) identify a special category of "discretionary" functions for which sovereign immunity was so crucial that a Government contractor who exercised discretion should share the Government's immunity from state tort law. . . . There is no more reason for federal common law to shield contractors now that the Government is liable for some torts than there was when the Government was liable for none. . . .

Far more indicative of Congress' views on the subject is the wrongful-death cause of action that Congress itself has provided under the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* – a cause of action that could have been asserted against United Technologies had Lt. Boyle's helicopter crashed a mere three miles further off the coast of Virginia Beach. . . .

IV

At bottom, the Court's analysis is premised on the proposition that any tort liability indirectly absorbed by the Government so burdens governmental functions as to compel us to act when Congress has not. That proposition is by no means uncontroversial. The tort system is premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention. If the system is working as it should, Government contractors will design equipment to avoid certain injuries (like the deaths of soldiers or Government employees), which would be certain to burden the Government. The Court therefore has no basis for its assumption that tort liability will result in a net burden on the Government (let alone a clearly excessive net burden) rather than a net gain.

Perhaps tort liability is an inefficient means of ensuring the quality of design efforts, but "[w]hatever the merits of the policy" the Court wishes to implement, "its conversion into law is a proper subject for congressional action, not for any creative power of ours." It is, after all, "Congress, not this Court or the other federal courts, [that] is the custodian of the national purse. By the same token [Congress] is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the Government against financial losses *however inflicted*. . . ." [Citations omitted.] If Congress shared the Court's assumptions and conclusion it could readily enact "A BILL [t]o place limitations on the civil liability of government contractors to ensure that such liability does not impede the ability of the

United States to procure necessary goods and services," H.R. 4765, 99th Cong., 2d Sess. (1986). (1986). It has not.

Were I a legislator, I would probably vote against any law absolving multibillion dollar private enterprises from answering for their tragic mistakes, at least if that law were justified by no more than the unsupported speculation that their liability might ultimately burden the United States Treasury. Some of my colleagues here would evidently vote otherwise (as they have here), but that should not matter here. We are judges not legislators, and the vote is not ours to cast.

I respectfully dissent.

[Justice STEVENS' dissent is omitted.]

IN RE BENDECTIN LITIGATION
857 F.2d 290 (6th Cir. 1988)

ENGEL, Chief Judge.

These [consolidated] actions were brought on behalf of children with birth defects against Merrell Dow Pharmaceuticals, Inc., alleging that their birth defects were caused by their mothers' ingestion during pregnancy of defendant's anti-nausea drug Bendectin. Immediately involved are eleven hundred eighty claims in approximately eight hundred forty-four multidistrict cases. These cases represent only a part of the Bendectin cases which have been brought in numerous federal and state courts around the nation. Although there are some differences among the complaints, most are virtually identical, requesting relief on the grounds of negligence, breach of warranty, strict liability, fraud, and gross negligence, and asserting a rebuttable presumption of negligence per se for defendant's alleged violation of the misbranding provisions of the federal Food, Drug and Cosmetic Act (FDCA).

[The claims found their way into the federal court for the Southern District of Ohio by different means. Several hundred were filed in that court or in the Northern District of Ohio; others were filed in Ohio state court and removed; several hundred others were filed in federal courts outside Ohio, or removed to such courts, and then were transferred to the Southern District of Ohio by the Judicial Panel on Multidistrict Litigation. The district judge indicated that under the *Erie* doctrine, all claims originally brought or removed to federal court in Ohio would be governed by Ohio law; plaintiffs whose cases were transferred from other districts would consent to the application of Ohio law if they voluntarily chose to participate in the trial of common liability issues. A number of plaintiffs chose to leave the consolidated proceedings after the completion of discovery.

The district judge also "trifurcated" the case, not only separating liability from damages, but also separating the question of proximate causation from other questions of liability and trying it first. After a 22-day trial on the causation question, the jury found that the plaintiffs had not proven by a preponderance "that ingestion of Bendectin at therapeutic doses during the period of fetal organogenesis is a proximate cause of human birth defects." The district judge therefore entered judgment for defendant.

On appeal, the plaintiffs challenged a number of the district court's rulings, including its decision to apply Ohio law to all plaintiffs and to separate the proximate cause issue through "trifurcation." The court of appeals affirmed on these issues.]

III. GOVERNING LAW OF PROXIMATE CAUSATION IN CONFLICT OF LAWS CONTEXT

Before determining whether proximate causation should properly be considered a separate issue for purposes of Rule 42(b), it is necessary first to determine under which jurisdiction's law of proximate causation we are operating. At trial, Judge Rubin applied

the substantive law of Ohio to any case brought in Ohio, citing *Erie,* and required all plaintiffs who transferred their cases to the Southern District of Ohio under MDL 486 and 28 U.S.C. § 1404 also to consent to have the liability issues tried in accordance with the substantive law of Ohio. Since the question of proximate causation was tried under the law of Ohio for all cases, and since the judge determined that the law of Ohio considered causation a separate issue from fraud, he prohibited the plaintiffs from introducing evidence that defendant had committed fraud in its submission to the FDA of test results regarding the safety of Bendectin. Because he found that fraud, even if proved, had no relation to the causation question under Ohio law, he concluded that the trifurcated case could proceed on the separate issue of causation.

While we are in agreement with the result reached by Judge Rubin, our course of reaching that decision differs from his in one important respect which requires closer analysis. On appeal, [certain plaintiffs] argue that Judge Rubin could not assign to them the burden of proof on the proximate causation question because the law of their home states would place this burden on the defendant. They argue that had the law of Ohio not been applied, and had there not been trifurcation, they could have proved a rebuttable presumption of negligence because of the defendant's violation of the FDCA, and the proof of that statutory violation would shift to the defendant the burden of proof regarding causation. They also argue that, as under Ohio law, the law of their home states would shift the burden of proof because of defendant's fraud. The alleged fraud they assert consisted of defendant's failure to report to the FDA the results of animal and human studies concerning Bendectin's propensity to cause birth defects. Even if Ohio law did not recognize this doctrine, it is argued by the *Wood* plaintiffs that the district judge was obligated to apply the law of Texas because Ohio's choice of law rules dictate that Texas law governs their claims, notwithstanding that the *Wood* plaintiffs originally filed their case in Ohio federal court. Since the law of Texas does not consider causation and liability to be separate issues in this type of case, they argue that the district court abused its discretion in trifurcating the claims brought by these Texas plaintiffs. They ask us to allow them to opt out of the common issues trial, presumably permitting them to have their case transferred to Texas and tried under the law of Texas, with the burden of proof upon the defendant.

[Other plaintiffs] who filed originally in other states and then transferred their cases to the multidistrict litigation [in Ohio] raise a slightly different argument. Rather than merely arguing, as do the *Wood* plaintiffs, that the district court could not force them to have their cases tried by the law of any state other than that which the conflicts rules of Ohio dictate, they assert that the district judge could not require that they submit to the law of any state other than that where the complaint was originally filed. The *Davis* plaintiffs claim that the law of Arizona should govern their case, and that since the district judge applied Ohio law, their case should be returned to Arizona to be tried under the law of Arizona, with the burden of proof upon the defendant in at most a bifurcated trial.

In response, defendant contends [among other things that] the plaintiffs' own proposed instructions placed the burden of proof on themselves, [that] the plaintiffs

themselves urged the district judge to apply the law of Ohio to this case, and [that] never argued that any other law should apply. Those plaintiffs who transferred into the common issues trial had the unfettered discretion to accept the Ohio forum and the district court's previously announced decision to apply Ohio law, or to return their cases to the district in which they were originally filed.

We agree with Judge Rubin's conclusion that under Fed.R.Civ.P. 51 any objections that the instructions on causation were not couched in terms of Arizona or Texas law were waived when not made before the jury retired. Even if such a claim were construed as plain error, we observe that there was no showing that the law of these states differed in any material respect from that of Ohio. Out of caution, however, we inspect this issue more closely.

The Supreme Court has long held that a federal district court exercising diversity jurisdiction must apply the same conflict of laws rules that the state court would apply. [Quoting *Klaxon*.] "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." [Citation omitted.]

Applying *Klaxon* here, it is apparent that it is Ohio's conflict of laws rules that must normally determine which substantive state law should govern the rights of the parties. Although determining what law should apply is not altogether without doubt, the Ohio Supreme Court appears to have clarified the issue substantially in this past decade. In the most recent of a series of cases, *Morgan v. Biro Mfg. Co.,* 15 Ohio St.3d 339, 474 N.E.2d 286 (1984) (per curiam), the Ohio Supreme Court reaffirmed its intention to abandon a strict adherence to the traditional rule of *lex loci delicti* in favor of a more flexible rule based on which state has "a more significant relationship to the lawsuit," in light of the factors set forth in section 145 of the *Restatement (Second) of Conflict of Laws*. *Morgan* involved a product liability action against the manufacturer of a meat grinder. There the court concluded that even though the product was manufactured in Ohio and the defendant manufacturer was incorporated in Ohio, Kentucky had the most significant relationship to the parties since that is the state where the injury occurred, the plaintiff resided, and the workers' compensation benefits were determined, and Kentucky was the state responsible for inspection of the condition and safety of the product for use in that state. As a basis for its holding, the court quoted both section 145 and section 6, as incorporated in section 145, of the Restatement of Conflicts. It is thus apparent that the Supreme Court of Ohio recognizes the limitations of the *lex loci delicti* rule that are imposed by the broader considerations of sections 145 and 6 of the Restatement, since it quotes both of these sections in full.

Applying here the flexible approach adopted in recent Ohio case law and codified in sections 145 and 6 requires an inquiry into which state possesses the most significant relationship. If this question cannot be determined, the law of the place of the injury controls.

Throughout this litigation there has been some discussion of the law of states in which non-Ohio plaintiffs are domiciled. We, however, see the law of the state of manufacture of the product as being more significant in this type of case than that of the state where an individual plaintiff happens to live. Merrell Dow manufactured and distributed a uniform drug internationally. The company issued a uniform set of warnings and instructions for use. The regulations governing the labeling, research, and distribution of the drug were governed either by Ohio law or by the federal Food, Drug and Cosmetic Act. Standards against which defendant's wrongful or negligent conduct may be measured are also set by Ohio and federal law.

In contrast, plaintiffs seem to allege either that their domicile states have a more substantial interest in the outcome of this litigation or that no state has a particularly substantial interest, and thus the law of the state of the place of injury should prevail. Both of these arguments fail, however. Domicile states do have a strong interest in the protection and well-being of their citizens, and the Restatement plainly regards domicile as one consideration in determining the existence of a substantial state interest. See § 145. Those plaintiffs who seek to apply the law of their state of domicile may also do so on the assumption that this is where the injury occurred. Such an assumption, however, is not at all clear, for the state of domicile at the time of suit may bear little or no relation to where a mother may have taken a morning sickness drug years before. A plaintiff presently residing in Arizona, for example, might nonetheless be found to have taken Bendectin while traveling in many different states. In short, it is difficult if not impossible to perceive any meaningful relationship to the subject matter of the lawsuit for the law of the state of domicile at the time of the suit, or the state in which the drug may have been prescribed, dispensed, ingested, or the state in which the child may have been conceived, or born.

This is far different from the circumstances which led the Ohio Supreme Court to apply Kentucky law in *Morgan.* The application of the same principles which led the court to Kentucky law in *Morgan* points unmistakably to Ohio law here. The State of Ohio is responsible for regulating local aspects of the marketing, manufacture, distribution, and labeling of the drug, and thus the relationship between the parties is essentially centered in Ohio, where the tortious conduct and the safety of the product are regulated. The fact that federal regulation through the FDCA impacts pervasively upon the development and approval of the drug in question tends further to minimize the significance of the law of other states and to focus emphasis upon the state of manufacture as the state in which application of the federal standards and oversight is most likely to occur.

The choice of Ohio law is even more persuasive when we apply, as we must under *Morgan,* the factors set forth in section 6 of the Restatement: "[T]he needs of the interstate and international systems"; "the protection of justified expectations"; "the basic policies underlying the particular field of law"; "certainty, predictability and uniformity of result"; and "ease in the determination and application of law to be applied" provide, in our judgment, a persuasive basis for holding that the more significant relationships were those of the place of manufacture. We therefore conclude that under Ohio conflicts law as

applied to the circumstances of these cases, the substantive law of Ohio was properly applied to those parties over whom the district court had jurisdiction.

One final choice of law problem, however, remains. When a defendant transfers a case to another district under 28 U.S.C. § 1404, the *Erie* doctrine requires that the court apply the *choice of law* rules of the transferor state. *Van Dusen v. Barrack,* 376 U.S. 612 (1964). [This case presents] the question whether section 1404(a) would require the application of the law of the transferor state when the plaintiff, rather than the defendant, seeks transfer under that statute. That is the situation here for the plaintiffs who voluntarily transferred their cases to the Southern District of Ohio after they had been originally filed in federal courts in other states. [The court held that even when the plaintiff seeks the transfer to another federal court, the law of the transferor court applies. (The Supreme Court later adopted this view in Ferens v. John Deere Co., 494 U.S. 516 (1990), *supra*. Therefore, actions originally filed in other federal courts would be determined by the choice-of-law rules of those states, rather than that of Ohio. Nevertheless, the court went on to find that this did not create a problem for the consolidation of the cases under Ohio substantive law:]

Rather than attempting to analyze the conflict of laws rules of every state in the union, we will assume that the only state laws that could apply to any individual suit would be that of the state where the injury occurred or the plaintiff was domiciled, or that of Ohio, as those would be the only places with interests sufficient to have their law govern under prevailing conflict of laws theory. In short, the district court would not have committed error if the pertinent state choice of law rules commanded that the substantive law of Ohio apply. Likewise, if the laws of any other state were the same as Ohio's on the issue of proximate causation in this case, any error on the conflict question would be harmless, for it could not have adversely affected the court's decision of the plaintiffs' rights. Instead of analyzing each state's law, then, we consider whether the district court properly concluded that the plaintiffs must prove proximate causation in these cases under Ohio law, and then determine whether any case that the plaintiffs have cited to us, or any other source of law in other jurisdictions, holds that on the facts alleged here, proximate causation was not a separate issue. Because this issue is intimately interwoven with the challenge to the trifurcation order, we discuss it in the section that follows.

IV. TRIFURCATION

[T]he plaintiffs challenge the district judge's decision to trifurcate this case by trying only the issue of proximate causation. [Among other things,] they maintain that under the law of proximate causation as applied in this case, causation is not an issue capable of separation from issues of defendant's fraud, wrongful conduct, or negligence. [I]n their assertion of the nonseparability of these two issues [proximate cause and liability], plaintiffs cite various tort theories that shift the burden of proof to defendants before causation has been proven more probable than not or weaken plaintiffs' burden of proof with regard to causation.

First, plaintiffs contend that in cases involving multiple possible causes, the courts must abandon any "but for" causation test in favor of the "substantial factor" test to be applied where plaintiff seeks to prove that the defendant's wrongful act is only one of several substantial factors bringing about the injury. Thus, it is argued, because the determination of wrongdoing affects which standard plaintiffs need prove, liability must be tried either before or contemporaneously with the determination of causation. Moreover, plaintiffs argue that the court should have charged the jury that the plaintiff need only show that Bendectin is a substantial contributing factor in causing birth defects and the burden of proof would then shift to the defendant to prove that Bendectin was not such a substantial factor.

[The Court discussed cases under Ohio law and then discussed the relevant provisions of the *Restatement (Second) of Torts*. It did not specifically discuss cases under the law of Arizona, Texas, or other relevant states.] Insofar as we can ascertain, the district judge's denial of plaintiffs' proposed instruction [asking for the less stringent "substantial factor" standard] would have been proper under the law of any state. . . .

[T]he substantial factor standard applies only to initial negligent actors in determining their liability in the face of action by a subsequent actor, or in determining causation between simultaneous actors, both of whose acts could have been "but for" causes of plaintiffs' injuries. For the same reasons that the plaintiffs' complaint would not have justified this instruction under the law of Ohio, it also would not have justified this instruction under the law of any other state, and we have been led to no other persuasive authority to the contrary.

[The court also rejected other theories that would have lessened the plaintiffs' burden of proof or shifted the burden to the defendants. Again, it discussed the provisions of the *Restatement* and its examples, as well as a few illustrative cases; it did not specifically examine the case law of particular relevant states.

Finally, the court rejected the plaintiffs' claim that they should have been allowed to prove that Merrell-Dow made misrepresentations concerning Bendectin in violation of the FDCA. The plaintiffs argued that such a violation would constitute "negligence per se" and would shift the burden of proof" on causation to the defendant.] Once again, the negligence per se argument is inapplicable to the facts of this case. The case law and legal commentary on application of the negligence per se standard in similar cases reveal that to shift the burden of proof to defendants plaintiffs must not only prove that defendant violated a statute, but also must prove that plaintiff's harm fell within the risk proscribed by the statute, or that there is a substantial probability (not necessarily more probable than not, but at least reasonably conceivable) that the violation and injuries are causally related. In the present case we find that the plaintiffs' proof of causation between certain types of birth defects and defendant's misrepresentations and/or omissions in conducting research and labelling Bendectin is beyond the realm of common experience, and thus plaintiffs would have been unable to shift the burden under the negligence per se standard even if violation of the FDCA was proved. While it is theoretically possible to envision a case where fraudulent research and mislabelling of a drug could, within the

realm of common experience, be seen to cause serious injuries to purchasers following consumption, plaintiffs here have simply failed to present sufficient evidence to indicate substantial probability of a causal link between ingestion of the mislabelled drug and plaintiffs' injuries.